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Premarital Wills and Pretermitted Children: West Virginia Law v. Revised Uniform Probate Code

Elma M. Reed

West Virginia University College of Law

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PREMARITAL WILLS AND PRETERMITTED CHILDREN: WEST VIRGINIA LAW v. REVISED UNIFORM PROBATE CODE

I. INTRODUCTION	197
II. PREMARITAL WILLS	198
A. <i>Revised Uniform Probate Code</i> § 2-301	199
1. Exceptions in RUPC § 2-301	200
2. Satisfying the Spouse's Share.....	202
B. <i>West Virginia Code</i> § 41-1-6	202
C. <i>Effect of Annulment or Divorce</i>	203
D. <i>Anti-Lapse Provisions</i>	205
III. PRETERMITTED CHILDREN.....	207
A. <i>Revised Uniform Probate Code</i> § 2-302	208
1. Effect of Homicide by A Devisee.....	209
2. Abatement.....	211
3. Exclusion from RUPC § 2-302(a)	213
B. <i>West Virginia Code</i> § 41-4-1 & § 41-4-2.....	213
IV. CONCLUSION	216

I. INTRODUCTION

The West Virginia Law Institute recently appointed an advisory committee to review those sections of the Revised Uniform Probate Code (RUPC) which pertain to intestate succession and elective shares. The committee's review centered primarily on the first three parts of Article II of the RUPC. After reviewing those sections, the Advisory Committee made recommendations as to possible legislation which would incorporate the provisions of the RUPC into West Virginia law. Included in the sections reviewed were the RUPC provisions pertaining to premarital wills and pretermitted¹ children which will be discussed in this article.

It has long been established in West Virginia that when a person dies testate, an attempt is made to distribute the estate in accordance

1. To pretermite is "to pass by, to omit or to disregard." BLACK'S LAW DICTIONARY 1069 (5th ed. 1979).

with the intent of the testator as evidenced in his will.² Circumstances may change after the execution of a will which cause the distribution of the estate as set forth in the will to vary from what the testator would have wanted had he contemplated the occurrence of that change when drafting his will. Two such circumstances are premarital wills and pretermitted children.

If a will is executed prior to a testator's marriage or the birth of the testator's child with no provision having been made for the spouse or child, both the RUPC and West Virginia law assume that the testator would have included the surviving spouse or child in the will had he foreseen the occurrence of such an event.³

This article will compare the provisions of the RUPC concerning premarital wills and pretermitted children with the appropriate West Virginia law. Section II will discuss the provisions relating to premarital wills as well as the effect of the testator's divorce or annulment on his will and the anti-lapse statutes of both the RUPC and West Virginia law. Section III will focus on pretermitted children, but will also review the provisions relating to abatement and how the killing of the testator by the devisee affects the will. Although the pertinent sections of the RUPC are still being considered for further revision, they will be discussed as currently proposed.

II. PREMARITAL WILLS

Section 2-301 of the RUPC applies only to a premarital will, that is, a will executed prior to a testator's marriage to his surviving spouse. It is the intent of RUPC § 2-301 to protect the surviving spouse of a marriage which was not contemplated when the testator's will was executed.⁴ The surviving spouse who receives an entitlement under the provisions of this section may receive a share equal to the value of the share he or she would have received had the testator died intestate.⁵

2. See *Hinton v. Milburn's Ex'rs.*, 23 W. Va. 166, 172 (1883). See also *Bently v. Ash*, 59 W. Va. 641, 646, 53 S.E. 636, 638 (1906).

3. See REVISED UNIFORM PROBATE CODE [hereinafter RUPC] §§ 2-301, - 302; W. VA. CODE §§ 41-1-6, 41-4-1, -2 (1982).

4. See RUPC § 2-301 comment.

5. See RUPC § 2-301(a).

In contrast to the RUPC, under West Virginia law, a premarital will is revoked by the subsequent marriage of the testator and the surviving spouse receives an intestate share unless the will provides for the marriage.⁶

A. *Revised Uniform Probate Code § 2-301*

Section 2-301(a) of the RUPC provides in pertinent part:

If the testator's surviving spouse married the testator after the testator executed his or her will, the surviving spouse is entitled to receive, as an intestate share, no less than the value of the share he or she would have received if the testator had died intestate as to that portion of the testator's estate, if any, that neither is devised to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse nor is devised or passes under Sections 2-603 or 2-604 to a descendant of such a child

Under subsection (a) of RUPC § 2-301, both the spouse who is omitted from a premarital will and the spouse who, although mentioned, is devised less than the share of the testator's estate he or she would have received had the testator died intestate, are entitled to receive a share equal to an intestate share. The spouse's entitlement is limited, however, to that portion of the estate not devised to the testator's children who are born prior to the testator's marriage to the surviving spouse, but are not the children of the surviving spouse or descendants of such children. Under this section, if the testator has a child before he marries the surviving spouse and this child is not the surviving spouse's child, any devise made to this child in a premarital will is excluded from satisfying the surviving spouse's share. If, however, the child born prior to the testator's marriage is also the child of the surviving spouse, any devise made to the child may be reduced in order to satisfy the entitlement of the surviving spouse. This provision reflects the opinion obtained in empirical studies that the interests of a step-child may need protection from the surviving spouse.⁷ However, if the

6. See W. VA. CODE § 41-1-6 (1982).

7. See Note, *A Comparison of Iowa's Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041 (1978); Fellows, Simon & Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the U.S.*, 1978 AM. B. FOUND. RES. J. 319; Fellows, Simon & Snapp, *An Empirical Study of the Illinois Statutory Estate Plan*, 1976 ILL. L. FORUM 717. These studies show that the tendency to give the surviving spouse 100% of the estate decreases when the decedent is also survived by a child who is not the child of the surviving spouse.

testator has devised a large portion of the estate to such a child, leaving an amount insufficient to adequately provide for the surviving spouse, the spouse may be able to take an elective-share amount as provided in RUPC § 2-201.⁸

1. Exceptions in RUPC § 2-301

A surviving spouse who marries the testator after the execution of the testator's will is not entitled to a share of the testator's estate if:

(1) it appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse;

(2) the will expresses the intention that it is to be effective notwithstanding any subsequent marriage; or

(3) the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.⁹

As demonstrated in *Estate of Gainer v. Estate of Gainer*,¹⁰ even though a testator may devise a portion of his estate to his surviving spouse by a will executed prior to their marriage, the will may be found not to be in contemplation of the testator's marriage to the surviving spouse. Eighteen months prior to her marriage to her surviving spouse, the testatrix in *Gainer* executed a will in which she bequeathed two of her personal bank accounts to her future spouse. Mrs. Gainer did not execute another will or codicil prior to her death two years later. When her will was admitted to probate, her surviving spouse filed a petition asserting that he was entitled to an intestate share of his wife's estate because he was a pretermitted spouse. The court held that, even though the surviving spouse was mentioned in the will, the provision had not been made in contemplation of the subsequent marriage to the surviving spouse and therefore the sur-

8. See Fisher, *Reforming the Law of Intestate Succession and Elective Shares: New Solutions to Age-Old Problems*, 93 W. VA. L. REV. 61 (1990) (discussion RUPC § 2-201).

9. RUPC § 2-301(a).

10. *Estate of Gainer v. Estate of Gainer*, 418 So. 2d 256 (Fla. 1982) (Florida adopted the UPC in 1974).

living spouse was found to be pretermitted.¹¹ Because the devise was held not to have been made in contemplation of the future marriage, the surviving spouse was entitled to a share which was no less than the value of the share he would have received had the testator died intestate. According to the *Gainer* court, the surviving spouse has the burden of proving that any provision made to him or her in the premarital will is not made in contemplation of marriage.¹² It is not necessary that this proof be found in the will itself, but can be shown by circumstances existing at the time of the execution of the will.¹³

Under the RUPC, a surviving spouse is not entitled to a share of the testator's estate if the premarital will expresses the intention that the will is to be effective even in the event of a subsequent marriage.¹⁴ Even though such an expressed intention may preclude a surviving spouse from receiving an entitlement under RUPC § 2-301, the spouse may be entitled to an elective-share amount under the provisions of RUPC § 2-201.¹⁵

If the testator provides for the surviving spouse outside the will with the intention that this provision be in lieu of the spouse taking under the will, the surviving spouse is not entitled to a share of the testator's estate.¹⁶ In *In re Estate of Bartell*, the testator transferred approximately \$230,000 to his surviving spouse in the years immediately preceding his death, leaving only about \$100,000 in his estate. The court found that the amount transferred was sufficient to indicate an intent by the testator to provide for his surviving spouse and was in lieu of a testamentary provision.¹⁷ If the court finds that the surviving spouse has been provided for outside the will, the spouse may not receive an entitlement under section 2-301.

11. *Id.* at 260.

12. *Id.*

13. *Id.*

14. RUPC § 2-301(a)(2).

15. See Fisher, *supra* note 8.

16. RUPC § 2-301(a)(3). See *In re Estate of Bartell*, 776 P.2d 885 (Utah 1989) (Utah adopted the UPC in 1975).

17. *Bartell*, 776 P.2d at 886.

2. Satisfying the Spouse's Share: RUPC § 2-301(b)

If the testator's surviving spouse receives an entitlement under RUPC § 2-301, any devise to the surviving spouse is used to satisfy this entitlement before devises to any other persons are reduced for this purpose.¹⁸ RUPC § 2-301(b) provides:

In satisfying the share provided by this section, devises made by the will to the testator's surviving spouse, if any, are applied first, and other devises (other than a devise to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse or a devise or substitute gift under Sections 2-603 or 2-604 to a descendant of such a child) abate as provided in Section 3-902.¹⁹

Under the provisions of this section, any devise made by the testator to his surviving spouse in a premarital will is counted toward the total entitlement of the surviving spouse and not in addition to it. Under these provisions, the bank accounts devised to the surviving spouse in *Gainer* would be taken into consideration when calculating his entitlement.

B. West Virginia Code § 41-1-6

Under W. VA. CODE § 41-1-6, a premarital will is revoked in its entirety by the subsequent marriage of the testator unless the will makes a provision for this marriage. However, under the RUPC a premarital will may be modified by a subsequent marriage to the extent necessary to provide for the testator's surviving spouse. The West Virginia statute provides in pertinent part, "[e]very will made by a man or woman shall be revoked by his or her marriage, annulment or divorce, except a will which makes provision therein for such a contingency"²⁰ Application of W. VA. CODE § 41-1-6 is found in *Hannah v. Beasley*.²¹ In *Hannah*, the testator had executed his will three years prior to his marriage to the surviving spouse. The West Virginia Supreme Court of Appeals found that "under the provisions of Code § 41-1-6, the effect of this marriage

18. RUPC § 2-301(b).

19. See *infra* note 65 and accompanying text.

20. W. VA. CODE § 41-1-6 (1982).

21. 132 W. Va. 814, 53 S.E.2d 729 (1949).

was to revoke the testamentary paper.”²² The premarital will was revoked in its entirety by the testator’s subsequent marriage.

In agreement with the provisions of the RUPC, West Virginia law does not revoke a premarital will upon the subsequent marriage of the testator if the will is made in contemplation of that marriage.²³ In *Smith v. Smith*, the court found a premarital will valid wherein it devised one-half of the testator’s property to his future wife but also provided that his entire estate should go to her if she married him.²⁴

RUPC § 2-301 applies only to the surviving spouse of a marriage which is subsequent to the execution of the testator’s will. Under this section, if a testator executes a will prior to his marriage but later divorces or is predeceased by that spouse, the previously executed will is still valid. Under West Virginia law, the testator’s will executed prior to his marriage is revoked by that marriage and is not reinstated by the subsequent divorce or death of that spouse. The premarital will is only revived by re-execution or by the execution of a codicil in which the intention to revive the previous will is shown.²⁵

C. *Effect of Annulment or Divorce*

Under West Virginia law, a will is revoked not only by a subsequent marriage, but also by an annulment of the testator’s marriage or by his divorce.²⁶ This provision is consistent with RUPC § 2-804 which states in part:

(a) . . . the divorce or annulment of a marriage:

(1) revokes (i) any revocable disposition or appointment of property made by a divorced individual to his [or her] former spouse in a governing instrument and any disposition or appointment created by law or in that governing instrument to a relative of the divorced individual’s former spouse, (ii) any revocable pro-

22. *Id.* at 816, 53 S.E.2d at 730.

23. *See Smith v. Smith*, 134 W. Va. 842, 62 S.E.2d 347 (1950).

24. *Id.*

25. W. VA. CODE § 41-1-8 (1982).

26. *Id.* § 41-1-6 (1982). This section was amended in 1975 to provide for the revocation of a will by annulment or divorce in addition to a subsequent marriage.

vision in a governing instrument made by a divorced individual conferring a general or non-general power of appointment on the divorced individual's former spouse and any power conferred in that governing instrument on a relative of the divorced individual's former spouse, and (iii) any revocable nomination of a divorced individual's former spouse in a governing instrument made by the divorced individual and any nomination in that governing instrument of a relative of the divorced individual's former spouse in any fiduciary or representative capacity, including but not limited to personal representative, executor, trustee, conservator, agent, or guardian.

Note that while West Virginia law revokes the entire will upon the divorce or annulment of the testator, the RUPC revokes only that disposition made to the former spouse or relative of that spouse.

The provisions of the RUPC not only apply to wills, but also to will substitutes such as "revocable inter-vivos trusts, life-insurance and retirement-plan beneficiary designations, transfer-on-death accounts, and other revocable dispositions to the former spouse that the divorced individual established before the divorce (or annulment)."²⁷ West Virginia law appears to apply only to the revocation of a will.²⁸

Under the RUPC a divorce or annulment not only revokes a will or will substitute, but also:

severs the interest of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship . . . transforming the form of ownership of the property from a joint tenancy with the right of survivorship . . . into a tenancy in common.²⁹

These provisions are inconsistent with West Virginia law which does not sever survivorship upon the divorce of spouses who own property as joint tenants with the right of survivorship.³⁰ West Virginia law allows joint ownership of property with the right of survivorship between persons who are not husband and wife.³¹ Therefore, when

27. RUPC § 2-804 comment (discussing the purpose and scope of the revision).

28. See W. VA. CODE § 41-1-6 (1982 & Supp. 1990).

29. RUPC § 2-804(a)(2).

30. See generally *Timberlake v. Haflin*, 379 S.E.2d 149 (W. Va. 1989) (former husband brought suit to force transfer of former wife's interest in home held jointly with right of survivorship); *Cook v. Cook*, 359 S.E.2d 342 (W. Va. 1987); *Myers v. Myers*, 342 S.E.2d 294 (W. Va. 1986); *Dodd v. Hinton*, 312 S.E.2d 293 (W. Va. 1984).

31. See *Wartenburg v. Wartenburg*, 143 W. Va. 141, 100 S.E.2d 562 (1957); W. VA. CODE § 36-1-20 (1985); *id.* § 36-1-19 (1985) (abolishing tenancy by entirety).

property is owned jointly with the right of survivorship by a married couple, divorce or annulment does not sever this ownership.

D. Anti-lapse Provisions

The entitlement which a surviving spouse receives under the provisions of RUPC § 2-301 does not include any portion of the testator's estate which passes under the antilapse provisions of RUPC § 2-603.³² RUPC § 2-603 prevents a specific devise to a testator's grandparent, a descendant of a grandparent or a stepchild from failing because the devisee has predeceased the testator. Any devise made to such a predeceased devisee passes under the provisions of this section to the descendants of that devisee.

This anti-lapse provision also applies to class gifts and void gifts.³³ Under the provisions of RUPC § 2-603(b), property which would have passed to a predeceased member of a class does not pass to the other members of that class, but passes by representation to the descendants of the predeceased devisee. The RUPC further provides that it is unnecessary to apply the antilapse provisions to gifts to "issue," "heirs," or to a class described by language of similar import as these gifts would pass by representation to the descendants of the predeceased class member and do not need the protection of the anti-lapse provisions.³⁴

The anti-lapse provisions of RUPC § 2-603 will not apply if the testator provides an alternate devise³⁵ or a contrary intention of the testator is found.³⁶ The RUPC resolves a conflict in case law as to whether words such as "to my daughter, A, if she survives me" or "to my surviving children" indicate a contrary intention on the part of the testator sufficient to defeat the antilapse provisions with the majority of cases holding that they do show such an intent.³⁷ Sub-

32. RUPC § 2-301(a).

33. *See id.* § 2-603(b). A void gift is a gift given to a devisee who is deceased at the execution of the will.

34. *Id.* § 2-603 comment (class gifts).

35. *See id.* § 2-603(d), (f) (defining alternate devise).

36. *Id.* § 2-601.

37. *E.g.*, Estate of Stroble, 6 Kan. App. 2d 955, 636 P.2d 236 (1981). *But see* Detzel v. Neiberding, 7 Ohio Misc. 262, 219 N.E.2d 327 (P. Ct. 1966) (stating that words of survivorship, by themselves, do not establish a contrary intention sufficient to defeat the anti-lapse statute).

section (c) of RUPC § 2-603, however, provides that “words of survivorship . . . are not (in the absence of additional evidence) a sufficient indication of an intent contrary to the application of this section.”³⁸

RUPC § 2-603 concerning individual gifts is in agreement with the West Virginia statute which provides:

If a devisee or legatee die before the testator, or be dead at the time of making of the will, leaving issue who survive the testator, such issue shall take the estate devised or bequeathed, as the devisee or legatee would have done if he had survived the testator, unless a different disposition thereof be made or required by the will.³⁹

Unlike the RUPC, the West Virginia statute does not limit the anti-lapse provisions to a grandparent, a descendant of a grandparent, or a stepchild of the testator.⁴⁰ WEST VIRGINIA CODE § 41-3-3 applies to “a devisee or legatee” who predeceases the testator or is dead “at the time of making of the will.” The only requirement of the devisee or legatee is that he or she be survived by issue.⁴¹ If no issue survive the devisee or legatee, the gift fails and, pursuant to W. VA. CODE § 41-3-4, it passes into the residuary estate of the testator.

If a predeceased devisee or legatee who takes as a member of a class dies survived by issue, the West Virginia statute is in agreement with the RUPC in substituting the issue for the predeceased devisee or legatee.⁴² However, if the devisee or legatee dies without issue, the share of the devisee does not pass to the other class members as it would under the RUPC, nor does it pass into the residuary estate of the testator as with an individual gift. The predeceased class member’s share passes as if the testator had died intestate as to that share of his estate.⁴³ Note again that under the provisions of the RUPC, “deceased class member” refers only to an individual

38. RUPC § 2-603(c).

39. W. VA. CODE § 41-3-3 (1982).

40. *Id.*

41. According to W. VA. CODE § 48-4-11 (1986), the term “issue” includes adopted children.

42. W. VA. CODE § 41-3-3 (1982).

43. *Id.*

who is "a grandparent, a descendant of a grandparent, or a stepchild of the testator" ⁴⁴

In agreement with the RUPC, the West Virginia Anti-lapse Statutes will not apply if a contrary intention of the testator is found in the will. ⁴⁵

III. PRETERMITTED CHILDREN

The RUPC defines "child" as "any individual entitled to take as a child under this code by intestate succession from the parent whose relationship is involved and excludes any person who is only a stepchild, a foster child, a grandchild, or any more remote descendant." ⁴⁶ For the purpose of intestate succession, the RUPC does include adopted children ⁴⁷ and illegitimate children ⁴⁸ in the definition of "child."

Under West Virginia law the term "child" includes not only the testator's natural children, adopted children, ⁴⁹ and illegitimate children, ⁵⁰ but also equitably adopted children. ⁵¹ West Virginia Code § 48-4-11 which provides for adopted children states in part, "a legally adopted child shall inherit from and through the parent or parents of such child by adoption . . . to the same extent as though said adopted child were a natural child of such adopting parent or parents." ⁵² It is the West Virginia Legislature's intent that adopted children be given "equal treatment in law with that accorded natural children." ⁵³

44. RUPC § 2-603(f)(2).

45. See generally *Mrocko v. Wright*, 309 S.E.2d 115 (W. Va. 1985); *Keller v. Keller*, 169 W. Va. 372, 287 S.E.2d 508 (W. Va. 1982).

46. RUPC § 1-201(5).

47. *Id.* § 2-114.

48. *Id.* § 2-114(2).

49. See W. VA. CODE § 48-4-11 (1986).

50. See *Adkins v. McElDowney*, 280 S.E.2d 231 (W. Va. 1981).

51. See W. VA. CODE § 48-4-11; *Wheeling Dollar Sav. & Trust Co. v. Singer*, 162 W. Va. 502, 250 S.E.2d 369 (1978).

52. Under W. VA. CODE § 48-4-11, an adopted child may inherit from a natural parent only if that natural parent is the spouse of the adoptive parent. The child may not inherit from the other natural parent. Unlike the West Virginia Code, the RUPC allows a child who is adopted by the spouse of one natural parent to inherit from or through both natural parents.

53. *Wheeling Dollar Sav. & Trust Co. v. Hanes*, 160 W. Va. 711, 712 n.1, 237 S.E.2d 499, 500 n.1 (1977).

West Virginia's doctrine of equitable adoption includes step-children, foster children, grandchildren or any child who has held a position exactly equivalent to that of a formally adopted or natural child since early childhood.⁵⁴ The equitably adopted child inherits as a formally adopted or natural child which includes the right to inherit as a brother or sister from another child of the equitably adopted parent.⁵⁵

A. *Revised Uniform Probate Code: § 2-302*

Section 2-302 of the RUPC applies to the testator's children born or adopted after the execution of the will and to any child living at the time of execution of the will if such child was omitted because the testator believed the child to be deceased.⁵⁶ Under this section, the after-born or after-adopted child who is omitted from the will receives a share of the estate equal in value to that which he would have received if the testator had died intestate unless the will devised all or substantially all of the testator's estate to the other parent of such a child.⁵⁷ The RUPC also precludes an omitted after-born or after-adopted child from receiving a share of the estate if the testator had children living at the time of the will's execution but did not devise a portion of the estate to any of the then-living children.⁵⁸ If the will does provide for any then-living children, an omitted after-born or after-adopted child does not take a full intestate share but receives a portion of the property devised under the will to the testator's then-living children.⁵⁹

54. *First Nat'l Bank in Fairmont v. Phillips*, 344 S.E.2d 201, 203 (W. Va. 1985).

55. *Phillips*, 344 S.E.2d 201.

56. The child omitted from the will because the testator believes the child to be deceased is included in the discussion of after-born and after-adopted omitted children.

57. RUPC § 2-301(a)(1).

58. *Id.* § 2-302(a)(2).

59. *Id.* § 2-301(a)(2)(i). RUPC § 2-302 provides:

(a) . . . if a testator fails to provide in his [or her] will for any of his [or her] children born or adopted after the execution of the will, the omitted after-born or after-adopted child receives a share in the estate as follows:

(1) If the testator had no child living when he [or she] executed the will, an omitted after-born or after-adopted child receives a share equal in value to that which he [or she] would have received if the testator had died intestate, unless the will devised all or substantially all the estate to the other parent of the omitted child and that other parent survives

Under the provisions of RUPC § 2-302, if a testator has no children at the time his will is executed, an omitted after-born or after-adopted child receives a share equal to the share he or she would have received had the testator died intestate unless all or substantially all of the estate is devised to the other parent of the pretermitted child. If the testator devises all or substantially all of his estate to the other parent, the child does not receive any share of the estate.⁶⁰ The other parent, however, must survive the testator and be entitled to take under the will.⁶¹

1. Effect of Homicide by A Devisee

It is possible for the surviving parent not to be entitled to take under the will due to a revocation of the devise made to that parent. As previously discussed, the devise is revoked by the divorce or annulment of the marriage between the testator and the other parent.⁶² A devise is also revoked by the intentional and felonious killing of the decedent by a devisee.⁶³ RUPC § 2-803 provides:

the testator and is entitled to take under the will.

(2) If the testator had one or more children living when he [or she] executed the will, and the will devised property or an interest in property to one or more of the then-living children, an omitted after-born or after-adopted child is entitled to a share in the testator's estate as follows:

(i) The portion of the testator's estate in which the omitted after-born or after-adopted child is entitled to share is limited to devises made to the testator's then-living children under the will.

(ii) The omitted after-born or after adopted child is entitled to receive the share of the testator's estate as limited in subparagraph (i) that he [or she] would have received if the testator had included all omitted after-born and after-adopted children with the children to whom devises were made under the will and had given an equal share of the estate to each child.

(iii) To the extent feasible, the interest granted an omitted after-born or after-adopted child under this section must be the same character, whether equitable or legal, present or future, as that devised to the testator's then-living children under the will.

(iv) In satisfying a share provided by this paragraph, devises to the testator's children who were living when the will was executed abate ratably. In abating the devises of the then-living children, the court shall preserve to the maximum extent possible, the character of the testamentary plan adopted by the testator.

60. RUPC § 2-302(a)(1).

61. *Id.*

62. *See id.* § 2-804.

63. RUPC § 2-803.

(a) An individual who intentionally and feloniously kills the decedent forfeits all benefits under this Article with respect to the victim's estate, including but not limited to an intestate share, an elective share, an omitted spouse or child's share

(b) The intentional and felonious killing of the decedent:

(1) revokes (i) any revocable disposition or appointment of property made by the victim to the killer in a governing instrument, (ii) any revocable disposition in a governing instrument made by the victim conferring a general or non-general power of appointment on the killer, and (iii) any revocable nomination of the killer in a governing instrument made by the victim, nominating or appointing the killer to serve in any fiduciary or representative capacity, including but not limited to personal representative, executor, trustee or agent.

According to RUPC § 2-803, a spouse, or any other devisee, who is guilty of the intentional and felonious killing of the testator forfeits all benefits he or she would have received due to the victim's death. If this situation should occur, even if the will devises all of the estate to the other parent of the omitted child, such a child would receive a share in the estate equal in value to that which he or she would have received had the testator died intestate because any devise to the other parent would be revoked.

RUPC § 2-803(b)(1) is similar to W. VA. CODE § 42-4-2 which provides:

No person who has been convicted of feloniously killing another, or of conspiracy in the killing of another, shall take or acquire any money or property, real or personal, or interest therein, from the one killed or conspired against either by descent and distribution, or by will, or by any policy or certificate of insurance, or otherwise; but the money or the property to which the person so convicted would otherwise have been entitled shall go to the person or persons who would have taken the same if the person so convicted had been dead at the date of the death of the one killed or conspired against, unless by some rule of law or equity the money or the property would pass to some other person or persons.

West Virginia law not only revokes a devise made to a person who is convicted of feloniously killing the testator, but also to one who is convicted of conspiring to kill the testator. The provisions of W. VA. CODE § 42-4-2 have been applied by the Supreme Court of Appeals of West Virginia in denying insurance benefits to a beneficiary who killed the insured.⁶⁴ Note, however, that under West Virginia

64. See *Metropolitan Life Ins. Co. v. Hill*, 115 W. Va. 515, 177 S.E. 188 (1934). See also *Johnson v. Metropolitan Life Ins. Co.*, 85 W. Va. 70, 100 S.E. 865 (1919) (decided prior to the adoption of W. VA. CODE § 42-4-2).

law, the devisee must be convicted of the felonious killing of the testator or of conspiring to kill the testator before being deprived of benefits he would have received upon the death of the victim.⁶⁵ Under the RUPC, conviction is not a requirement in bringing a devisee under the provisions of § 2-803. It is only necessary that the devisee intentionally and feloniously kill the decedent.

RUPC § 2-803 further provides that the intentional and felonious killing of the decedent:

(2) severs the interests of the victim and killer in property held by them at the time of the killing as joint tenants with the right of survivorship . . . transforming the form of ownership of the property from a joint tenancy with the right of survivorship . . . into a tenancy in common.⁶⁶

Under *Miller v. Sencindiver*,⁶⁷ West Virginia law does not sever jointly held estates upon the felonious killing of one co-owner by another co-owner. In *Miller*, a wife who pled guilty to the involuntary manslaughter of her husband was not denied full ownership of property held jointly with the victim which passed to her through the right of survivorship.⁶⁸ In holding that W. VA. CODE § 42-4-2 is not applicable to sever jointly held property, the West Virginia court stated that the rights of survivorship are established by deed and "do not involve descent or inheritance."⁶⁹ The court said that, at present, there is no "statutory caveat that denies a survivor's title to a slayer of his or her co-owner,"⁷⁰ but that the Legislature could address this issue.⁷¹ The *Miller* decision is adverse to the well established principle that a wrongdoer should not profit from his own wrongful act.⁷²

2. Abatement⁷³

In order to satisfy the share of a pretermitted child under RUPC § 2-302(a)(1) (when no child living at time of execution of the will)

65. W. VA. CODE § 42-4-2 (1982).

66. RUPC § 2-803(b)(2).

67. 166 W. Va. 355, 275 S.E.2d 10 (W. Va. 1980).

68. *Id.*

69. *Id.* at 359, 275 S.E.2d at 13.

70. *Id.* at 362, 275 S.E.2d at 15.

71. *Id.*

72. See generally *Johnson v. Metropolitan Life Ins. Co.*, 85 W. Va. 79, 100 S.E. 865 (1919) (denying life insurance benefits to a wife who murdered her insured husband).

73. Abatement in this section refers to the reduction of devises made under a will in order to satisfy the entitlement of an omitted child.

or § 2-302(c) (child omitted because believed to be dead), the devises made by the will abate as follows:

(1) property not disposed of by the will; (2) residuary devises; (3) general devises; (4) specific devises. . . . Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will.

If the will expresses an order of abatement, or if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (a), the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.⁷⁴

If the testator had children living at the time the will was executed, the pretermitted child receives a share of the testator's estate only if a portion of the estate was devised to one or more of the then-living children.⁷⁵ The pretermitted child is not entitled to a full intestate share but receives a portion of the estate devised to any then-living children by the will.⁷⁶ The devises made to the testator's then-living children abate ratably in satisfying the share of the pretermitted child.⁷⁷

Example 1:

Testator devises \$7,500 each to two of his children who were living at the time the will was executed. After the execution of the will, the testator has another child for whom no provision is made. The pretermitted child is entitled to \$5,000; i.e. \$2,500 (1/3 of \$7,500) from each then-living child making the share of each child \$5,000.⁷⁸

Example 2:

Testator devises \$10,000 to A, the testator's child living at the execution of the will, and \$5,000 to B, also the testator's child living when the will was executed. A pretermitted child receives \$5,000; i.e. \$3,333 (1/3 of \$10,000) from A's devise reducing it to \$6,667,

74. UPC § 3-902 (1969).

75. RUPC § 2-302(a)(1).

76. *Id.* § 2-302(a)(2)(i).

77. *Id.* § 2-302(a)(2)(iv).

78. *Id.* § 2-302(a)(2) comment.

and \$1,667 (1/3 of \$5,000) from B's devise reducing it to \$3,333.⁷⁹

Note that under example 2 the pretermitted child receives a share greater than that of one of the then-living children.

The abatement provisions of the RUPC appear to be consistent with the West Virginia statute which provides for ratable contribution.⁸⁰

3. Exclusion from RUPC § 2-302(a)

If the omission of the after-born or after-adopted child appears from the will to be intentional or if the child is provided for outside the will in lieu of a testamentary provision, such child is then precluded from receiving a share of the testator's estate as set forth in RUPC § 2-302(a).⁸¹ RUPC § 2-302(b) provides:

Neither subsection (a)(1) or (a)(2) apply if:

(1) it appears from the will that the omission was intentional; or

(2) the testator provided for the omitted child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount or other evidence.

B. *West Virginia Code § 41-4-1 and § 41-4-2*

The West Virginia statutes pertaining to pretermitted children, W. VA. CODE § 41-4-1 and § 41-4-2, provide for such a child if the testator has children living at the execution of the will and also if there are no children living.⁸² If a testator has no children living at

79. *Id.*

80. See W. VA. CODE §§ 41-4-1, -2 (1982).

81. RUPC § 2-302(b).

82. W. VA. CODE § 41-4-1 provides:

If any person die leaving a child or his wife with child, which shall be born alive and leaving a will made when such person had no child living, wherein any child he might have is not provided for or mentioned, such child, or any descendant of his, shall succeed to such portion of the testator's estate as he would have been entitled to if the testator had died intestate, and towards raising such portion the devisees and legatees shall, out of what is devised and bequeathed to them, contribute ratably, either in kind or in money, as a

the time the will is executed, both the RUPC and the West Virginia Code provide for a pretermitted child to receive a portion of the estate which is equal to that which the child would have received had the testator died intestate.⁸³ The RUPC does not permit the pretermitted child to receive any portion of the estate if all or substantially all of the estate is devised to the other parent of the pretermitted child, providing the other parent survives the testator and is entitled to take under the will.⁸⁴ The applicable West Virginia statute provides no such exception to the general rule.⁸⁵ Under the West Virginia Code, if a devise is made to the testator's spouse in a will executed prior to the birth of their child and no provision is made in the will for an after-born child, the devise to the surviving spouse is conditional upon the event that the child die before the age of eighteen, unmarried and without issue.⁸⁶ Under the provisions of W. VA. CODE § 41-4-1 and § 41-4-2, it is possible for an estate to remain unsettled for up to eighteen years if the testator dies before the birth of the pretermitted child.

If the testator has a child living at the execution of his will but does not provide for this child, the RUPC precludes any omitted after-born or after-adopted child from receiving a share of the testator's estate.⁸⁷ Under the same circumstances, West Virginia law

court, in the particular case, may deem most proper. But if any such child, or descendant, die under the age of eighteen years, unmarried and without issue, his portion of the estate, or so much thereof as may remain unexpended in his support and education, shall revert to the person or persons to whom it was given by will.

W. VA. CODE § 41-4-2 provides:

If a will be made when a testator has a child living, and a child be born afterwards, such after-born child or any descendant of his, if not provided for by any settlement, and neither provided for nor expressly excluded by the will, but only pretermitted, shall succeed to such portion of the testator's estate as he would have been entitled to if the testator had died intestate, toward raising which portion the devisees and legatees shall, out of what is devised and bequeathed to them, contribute ratably, either in kind or in money, as a court in the particular case may deem most proper. But if any such after-born child or descendant die under the age of eighteen years, unmarried and without issue, his portion of the estate, or so much thereof as may remain unexpended in his support and education, shall revert to the person or persons to whom it was given by will.

83. RUPC § 2-302(a)(1); W. VA. CODE § 41-4-1 (1982).

84. RUPC § 2-302(a)(1).

85. See W. VA. CODE §§ 41-4-1, -2 (1982 & Supp. 1990).

86. See *id.*

87. RUPC § 2-302(a)(2).

allows the pretermitted child to receive a share of the estate equal to that which he or she would have received had the testator died intestate.⁸⁸

If the testator has provided for then-living children in his will, the RUPC allows the pretermitted child to share in the testator's estate, but this share "is limited to devises made to the testator's then-living children under the will."⁸⁹ West Virginia Code § 41-4-1 allows the pretermitted child to take the entire amount that he would have received had the testator died intestate; the amount is not limited to that portion of the testator's estate devised to the then-living children. Under this section, a devise made to a child living at the execution of the will may be used in satisfying the pretermitted child's share.

Both the RUPC and West Virginia law preclude the pretermitted child from receiving a share of the testator's estate if the child has been provided for outside the will in lieu of a testamentary provision.⁹⁰

Although neither W. VA. CODE § 41-4-1 or § 41-4-2 specifically mentions after-adopted children, as does the RUPC, it follows from W. VA. CODE § 48-4-11 and *Wheeling Dollar Sav. & Trust Co. v. Hanes*⁹¹ that in West Virginia an after-adopted child would be entitled to receive the same share of the testator's estate to which an after-born natural child is entitled under W. VA. CODE § 41-4-1 and § 41-4-2.

RUPC § 2-302(c) provides for a living child omitted from the will because the testator believed the child to be dead and entitles such child to receive a share in the estate equal in value to that which he would have received had the testator died intestate. This situation is not provided for under the West Virginia Code.

88. W. VA. CODE § 41-1-2 (1982).

89. RUPC § 2-302(a)(2)(i).

90. *Id.* § 2-302(b)(2); W. VA. CODE § 41-4-2 (1982).

91. 237 S.E.2d 499 (W. Va. 1977). See *supra* note 53 and accompanying text.

IV. CONCLUSION

Acceptance of RUPC § 2-301 and § 2-302 as proposed would result in the following significant changes in current West Virginia law:

1) A will would no longer be revoked in its entirety by the subsequent marriage of the testator but would be modified to protect the surviving spouse;⁹²

2) The subsequent divorce or annulment of the testator's marriage would not only revoke a prior will but also a will substitute;⁹³

3) The right of survivorship would be severed upon the annulment or divorce of a married couple who own property as joint tenants with the right of survivorship;⁹⁴

4) The anti-lapse provisions would no longer apply to any devisee or legatee who predeceases the testator but only to a grandparent, a descendant of a grandparent or a stepchild of the testator;⁹⁵

5) It is questionable whether the term "child" would include an equitably adopted child;⁹⁶

6) The pretermitted child would no longer be entitled to a share of the testator's estate if all or substantially all of the estate is devised to the other parent of the child;⁹⁷

7) The pretermitted child would no longer receive a share of the testator's estate if children living at the time of the will's execution were not provided for;⁹⁸

8) The pretermitted child's share would be limited to the devises made to any children living at the time of the will.⁹⁹ These devises would abate ratably;¹⁰⁰

92. See RUPC § 2-301.

93. See *id.* § 2-804.

94. See *id.* § 2-804(a)(2).

95. *Id.* § 2-603.

96. See *id.* § 1-201(5).

97. See RUPC § 2-302(a)(1).

98. See *id.* § 2-302(a)(2).

99. See *id.*

100. See *id.*

9) Children omitted from a will because the testator believed them to be deceased would be provided for;¹⁰¹ and

10) The intentional and felonious killing of a decedent would sever estates held jointly by the decedent and the killer.¹⁰²

In its report to the West Virginia Law Institute Council, the Advisory Committee did not recommend adoption of either RUPC § 2-301 or § 2-302 as they are presently proposed. The Committee believes RUPC § 2-301 needs to be amended to clearly indicate that a surviving spouse omitted from the will has the option to either elect against the will and take an elective share under RUPC § 2-201 or accept the share provided under § 2-301. The Committee would recommend adoption of RUPC § 2-302 if it is amended to provide protection not only for a child but also the descendant of a child who is entitled to take under the provisions of this section. With the above amendments, the Committee believes the RUPC provisions pertaining to an omitted spouse or child would make an improvement in West Virginia law.

Although there are likely to be strong emotions associated with any attempt to change existing West Virginia property law, those emotions are likely tied to an understandable reluctance to tamper with a generally well settled area of the law. However, if one considers the common expressions of intent as illustrated by various modern studies, the need for our legislature to consider the RUPC is clear.

Elma M. Reed

101. See *id.* § 2-302(c).

102. See *id.* § 2-803(b)(2).

